

1 LORI E. PEGG, Acting County Counsel (S.B. #129073)
 2 MELISSA R. KINIYALOCKS, Deputy County Counsel (S.B. #215814)
 3 OFFICE OF THE COUNTY COUNSEL
 4 70 West Hedding Street, East Wing, Ninth Floor
 5 San Jose, California 95110-1770
 6 Telephone: (408) 299-5900
 7 Facsimile: (408) 292-7240

8 Attorneys for Defendants
 9 SHERIFF LAURIE SMITH and
 10 COUNTY OF SANTA CLARA

11 UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 TOM SCOCCA, MADISON SOCIETY, INC.,
 14 and THE CALGUNS FOUNDATION, INC.,

15 Plaintiffs,

16 v.

17 SHERIFF LAURIE SMITH (In her individual
 18 and official capacity.), COUNTY OF SANTA
 19 CLARA, and DOES 1 to 20,

20 Defendants.

No. CV11-01318 EMC

**REPLY TO OPPOSITION TO MOTION TO
DISMISS FIRST AMENDED COMPLAINT**

Date: November 15, 2012
 Time: 2:30 p.m.
 Crtrm.: 5, 17th Floor
 Judge: Honorable Edward M. Chen

I.

INTRODUCTION

21 On December 6, 2012, the United States Court of Appeals for the Ninth Circuit will hear oral
 22 argument in two cases that Plaintiffs concede have direct bearing on this action: (1) *Peruta v. County*
 23 *of San Diego*, Case No. 10-56971;¹ and (2) *Richards v. Prieto*, Case No. 11-16255.² See, Opposition

24 ¹The District Court in *Peruta* rejected plaintiffs' contention that strict scrutiny applied to the San
 25 Diego County Sheriff's exercise of discretion to issue licenses to carry concealed weapons. *Peruta*,
 26 758 F.Supp.2d 1106, 1117 (S.D. Cal. 2010). The court instead applied intermediate scrutiny. *Id.*

27 ² In *Richards*, plaintiffs challenged in equal-protection grounds the Yolo County Sheriff's
 28 implementation of a policy regarding issuance of licenses to carry concealed weapons; specifically,
 the requirement that applicants demonstrate that they have a valid reason to request a license to carry
 a concealed weapon, such as credible threats of violence against the applicant and being a business
 owner who carries large sums of cash. *Richards*, 821 F.Supp.2d 1169 (E.D. Cal. May 16, 2011).

1 to Motion to Dismiss FAC at 7:27-18. Because the Ninth Circuit will rule in these two cases on
 2 legal issues that bear directly on this case,³ Defendants respectfully request that the Court stay this
 3 action pending the Ninth Circuit's decisions in *Peruta* and *Richards*. But if the Court declines to
 4 stay the action and proceeds to rule on Defendants' motion to dismiss, Defendants respectfully
 5 request that the First Amended Complaint be dismissed without further leave to amend.

6 Plaintiffs failed to cite any authority in their opposition that contradicts the conclusion that
 7 Sheriff Laurie Smith is immune under the Eleventh Amendment and cannot be sued in her official
 8 capacity pursuant to 42 U.S.C. § 1983. Additionally, Plaintiffs misrepresent the holding in a case
 9 that they contend establishes that the Sheriff is not entitled to qualified immunity. The relevant
 10 authorities establish that the Sheriff cannot be sued in her personal capacity because she is entitled to
 11 qualified immunity.

12 Moreover, the County of Santa Clara must be dismissed because Plaintiffs failed to allege
 13 that any County policy or custom was the moving force behind their alleged constitutional
 14 violations. Thus, as a matter of law, Plaintiffs have no cognizable Section 1983 claim against the
 15 County.

16 Further, the equal protection claim fails as a matter of law because the Sheriff's exercise of
 17 discretion in denying Plaintiff Tom Scocca's application for a license to carry a concealed weapon
 18 did not substantially burden his right to self-defense. Scocca has a license to openly carry a loaded
 19 firearm in the course of his employment as a private investigator and is not precluded from keeping
 20 firearms in his home for self-defense. Plaintiffs failed to cite any authority in support of their
 21 argument that there is a fundamental right to carry a concealed weapon and that the Sheriff should
 22 not have discretionary authority to grant or deny applications to carry concealed weapons.

23
 24
 25 The District Court held that regulation of concealed firearms is an essential part of maintaining
 26 public safety and preventing crime and that the Sheriff's implementation of the policy was rationally
 27 related to these legitimate government goals. *Id.*

28 ³ The appeals in *Peruta* and *Richards* have been assigned to the same panel but are not consolidated
 for oral argument. See October 9, 2012 Filed Clerk Order in *Peruta*, Case No. 11-16255 and
Richards, Case No. 10-56971.

1 Finally, Scocca cannot establish a class-of-one equal protection claim because the doctrine
 2 does not apply to discretionary decisions based on subjective, individualized assessments. Scocca
 3 generally alleges that he and the holders of licenses to carry concealed weapons all have in common
 4 a desire to exercise the right of self-defense outside their home and all have good moral character.
 5 Such generality fails to show the requisite “extremely high degree of similarity” between Scocca and
 6 the holders of licenses to carry concealed weapons to survive dismissal of his class-of-one equal
 7 protection claim. Accordingly, the First Amended Complaint should be dismissed with prejudice.

8 II.

9 ARGUMENT

10 A. THE SHERIFF IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY AND 11 QUALIFIED IMMUNITY

- 12 1. Plaintiffs cite no authority for their conclusory argument that the Sheriff does not
 13 have Eleventh Amendment immunity.

14 Defendants discussed in detail in their moving papers *Venegas v. County of Los Angeles*, 32
 15 Cal.4th 820, 839 (2004), in which the California Supreme Court held that in California sheriffs act as
 16 state officers while performing state law enforcement duties. Plaintiffs reject the Eleventh
 17 Amendment’s application to this case by concluding in their opposition that the “11th Amendment
 18 argument is absurd and should be summarily rejected by the Court.” Opposition at 12:13-14.
 19 Plaintiffs, however, failed to cite any authority for this conclusory argument.

20 Legal authority demonstrates that the Sheriff is a state actor when exercising her discretion to
 21 grant or deny applications for licenses to carry concealed weapons. Accordingly, the Sheriff cannot
 22 be sued in her official capacity under Section 1983.

- 23 2. Plaintiffs misrepresent the authority they cite for their claim that the Sheriff is not
 24 entitled to qualified immunity.

25 Plaintiffs contend that the Sheriffs is not entitled to qualified immunity and cite *Guillory v.*
 26 *County of Orange*, 731 F.2d 1379 (9th Cir. 1984). Opposition at 12:15-19. Plaintiffs contend that
 27 *Guillory* held that the sheriff in that case was not entitled to qualified immunity. *Id.* *Guillory* did
 28 not, however, even mention qualified immunity.

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1 *Guillory* held that: (1) unsuccessful applicants for licenses to carry concealed weapons could
 2 bring a claim pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978),⁴ against the
 3 city and county based on alleged unconstitutional policies or customs; (2) statutory immunities under
 4 California Government 820.2 and 821.2 did not apply to claims pursuant to 42 U.S.C. § 1983; and
 5 (3) the district court abused its discretion by limiting the scope and extent of cross-examination of
 6 the sheriff at trial. *Guillory*, 731 F.2d at 1381-83.

7 The doctrine of qualified immunity protects government officials “from liability for civil
 8 damages insofar as their conduct does not violate clearly established statutory or constitutional rights
 9 of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).
 10 The Sheriff did not violate Scocca’s right to equal protection because he does not have a
 11 constitutional right to carry a concealed weapon. And even if the Court concludes that he has a right
 12 to carry a concealed weapon, the right was not clearly established at the time the Sheriff denied
 13 Scocca’s application. Courts have recognized a fundamental right to self-defense “of hearth and
 14 home,” but not a fundamental right to carry a concealed weapon. See *District of Columbia v. Heller*,
 15 554 U.S. 570, 635 (2008). Accordingly, the Section 1983 claim against the Sheriff should be
 16 dismissed with prejudice.

17 **B. PLAINTIFFS HAVE NO CONGIZABLE CLAIM AGAINST THE COUNTY**

18 Plaintiffs concede that the County does not have the power to force the Sheriff to issue any
 19 licenses to carry concealed weapons. Opposition at 12:22-24. Instead, they contend that the County
 20 must not be dismissed until “Plaintiffs can substantiate who will pay damages in this case.” *Id.* at
 21 12:24. This is insufficient to state a Section 1983 claim against the County.

23 ⁴ *Monell* held that a municipality may not be held liable under 42 U.S.C. § 1983 solely because it
 24 employs a tortfeasor. *Monell*, 436 U.S. at 692. Instead, a plaintiff must identify a municipal “policy”
 25 or “custom” that caused the injury. *Id.* A plaintiff must also demonstrate that, through its deliberate
 26 conduct, the municipality was the “moving force” behind the injury alleged. *Board of County*
 27 *Commissioners of Bryan County, Okl. v. Brown*, 520 U.S. 397, 404 (1997). That is, a plaintiff must
 28 show that the municipal action was taken with the requisite degree of culpability and must
 demonstrate a direct causal link between the municipal action and the deprivation of federal rights.
Id.

1 Plaintiffs are only challenging the manner in which the Sheriff exercises her discretion to
 2 grant or deny applications for licenses to carry concealed weapons. Opposition at 7:1-4 and 12:6-8.
 3 Plaintiffs have not alleged that any County policy or custom caused them to suffer a deprivation of
 4 the right to equal protection. As such, Plaintiffs failed to state a cognizable *Monell* claim against the
 5 County as a matter of law. Accordingly, the County should be dismissed with prejudice.

6 **C. PLAINTIFFS' EQUAL PROTECTION CLAIM FAILS AS A MATTER OF LAW**

7 Plaintiffs allege that “[t]he gravamen of the [equal protection] cause of action in this case is
 8 the irrational and inexplicable conduct by a local government official who has a duty to administer
 9 the law even-handedly under the Fourteenth Amendment’s commandment that Sheriff Smith shall
 10 not ‘deny to any person . . . the equal protection of the laws.’” Opposition at 13:14-17. Plaintiffs
 11 contend that this “is an equal protection case about the fundamental right of self-defense.” *Id.* at
 12 13:6-7.

13 Plaintiffs, however, have no authority for their argument that there is a fundamental right to
 14 self-defense outside the home. As discussed in more detail in Defendants’ moving papers, the
 15 United States Supreme Court recognized in *Heller* and *McDonald* the right of law-abiding,
 16 responsible citizens to self-defense in the home. *District of Columbia v. Heller*, 554 U.S. 570
 17 (2008); *McDonald v. Chicago*, 130 S.Ct. 3020 (2010). But neither case recognized a fundamental
 18 right to carry a concealed weapon. Moreover, neither case prescribed the appropriate level of
 19 judicial scrutiny for firearms regulations.

20 There is also no authority for Plaintiffs’ argument that there is a fundamental right to carry a
 21 concealed weapon. *Heller* acknowledged that the right secured by the Second Amendment was not
 22 unlimited and “was not a right to keep and carry any weapon whatsoever in any manner whatsoever
 23 and for whatever purpose.” *Heller*, 554 U.S. at 626. The Court noted that “nothing in our opinion
 24 should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons
 25 and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools
 26 and government buildings, or laws imposing conditions and qualifications on the commercial sale of
 27 arms.” *Id.* at 626-27. The Court cautioned that “we identify these presumptively lawful regulatory
 28 measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n. 26.

Moreover, Plaintiffs make no attempt to identify what level of scrutiny they contend applies to the Sheriff's exercise of discretion in granting or denying applications to carry concealed weapons. They simply conclude that scrutiny is a red herring. Opposition at 13:18. But this Court recognized in its order granting Defendants' motion to dismiss the original complaint that the level of scrutiny to apply in this case is important. "[W]here an equal protection claim is based on membership in a suspect class such as race or the burdening of a fundamental right, then heightened scrutiny is applied; otherwise only rational review applies." Order Granting Defendants' Motion to Dismiss, Docket No. 9, at 9:9-11 (citing *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277-78 (9th Cir. 2005)). Plaintiffs, however, "expressly disavowed any argument based on rational review; *i.e.*, that even if no fundamental right were involved the Sheriff's denial of his application for a license to carry a concealed weapon was without rational basis. *Id.* at 9:17-20. Thus, this Court concluded, "if the allegations in the complaint do not establish that some kind of heightened scrutiny should apply, Mr. Scocca has essentially admitted that he has no case." *Id.* at 9:20-21.

As discussed in more detail in Defendants' moving papers, Plaintiffs' equal protection claim fails no matter what level of scrutiny is applied. Scocca merely desires to have a license to carry a concealed weapon to bolster the commercial business of his private investigation firm. He has not alleged any burden, let alone a substantial burden, on his right to "defense of hearth and home." Without any stated substantial burden on his right to keep and bear arms for self-defense, only rational basis review applies. Plaintiffs have no viable claim under rational basis review.

Finally, Plaintiffs failed to address Defendants' authority regarding the class-of-one doctrine, which does not apply to forms of state action that "by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 603, (2008). In such cases, treating like individuals differently is an accepted consequence of discretionary decisions. *Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012) *cert. denied*, 132 S. Ct. 1656.

As this Court noted in its order granting Defendants' motion to dismiss the original complaint, "[c]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." Order Granting Defendants'

